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Paper No. 4

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JUL 17 2002

In re Application of : **OFFICE OF PETITIONS**
Kirkpatrick et al. :
Application No. 10/045,436 : **DECISION ON PETITION**
Filed: November 7, 2001 :
Attorney Docket No. 60027.075US01/BS01302 :

This is a decision on the petition filed March 19, 2002, requesting, in effect, that page 19 of the specification filed on March 19, 2002, be entered as part of the original disclosure.

The petition is **dismissed**.

Any request for reconsideration must be submitted within **TWO (2) MONTHS** from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are **NOT** permitted. This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The application was filed on November 7, 2001. On February 19, 2002, the Office of Initial Patent Examination mailed a "Notice of Omitted Item(s)" stating that the application had been accorded a filing date of November 7, 2001, and advising applicants that page 19 of the specification appeared to have been omitted.

In response, the present petition was filed. Petitioner alleges page 19 was filed with the original application.

All the evidence present in the file has been carefully considered, but is not persuasive that page 19 was submitted with the original application.

The last portion of MPEP 513 states,

Where there is a dispute as to the contents of correspondence submitted to the Office (e.g., an applicant asserts that three sheets of drawings were submitted under 37 CFR 1.10 with an application, but the Office records indicate receipt of only two sheets of drawings with the application) ... The Office will rely upon its official record of the contents of such correspondence in absence of convincing evidence (e.g. a postcard receipt

While petitioner apparently believes that page 19 was filed on November 7, 2001, the file of application No. 10/045,436¹ shows that page 19 was not received, since no such papers are present in the file. An applicant alleging that a paper was filed in the USPTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence. In this regard,

¹ The file contains the actual papers received and the file is an official government record prepared and maintained by disinterested USPTO employees as a part of their customary and usual duties.

declarations by individuals involved in the preparation and filing of the original application reciting their personal recollection or belief of what was contained in the application that they reviewed are generally not more persuasive of what was actually filed in the USPTO than the contents of the application file. Such declarations are usually made weeks or months after the actual events recited. In this case, the record is unclear whether Leonard Hope, the individual signing the petition, even participated in the copying and mailing of the application. The mere statement that page 19 was filed with the application does not have more probative value than the official government record of what was actually received in the USPTO on November 7, 2001.

Petitioner has only demonstrated an intent to file page 19 and has not established that the page 19 was actually filed. Unfortunately, patent applicants and their representatives, who intend to file complete applications, occasionally file applications which are missing one or more pages, due to clerical error, a copying machine error (such as papers sticking together), papers falling out of a file, or another reason. A demonstration of an intent to include a page or pages does not establish the actual receipt of such pages by the Office.

It is for this reason that the USPTO has established a practice of providing a receipt for papers filed in the USPTO to any applicant desiring a receipt. The practice, which has been in existence for many years and is well publicized, requires that any paper for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. See section 503, Manual Of Patent Examining Procedure (MPEP 503).

Petitioner has supplied a copy of the postcard mailed to the Patent and Trademark Office but has not supplied a copy of a postcard returned by the Office indicating that all of the parts of the application were received.

The evidence of record fails to prove that page 19 was submitted with the original application.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
Box DAC
Washington, D.C. 20231

By facsimile: (703) 308-6916
Attn: Office of Petitions


By hand: Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA 22202

Since applicants have not filed a petition under 37 CFR 1.182 requesting March 19, 2002, the date the missing page was filed, as the filing date, page 19 filed on March 19, 2002, will not be entered.

An amendment to the specification deleting references to page 19 should be filed prior to the first USPTO action in order to avoid further delays in the examination of the application. In the alternative, if petitioner desires for the examiner to consider pages which were not submitted as part of the original disclosure, then petitioner may seek to submit some or all of those pages as an amendment. Any such amendment will, of course, be reviewed by the examiner for new matter. See MPEP 608.02(a).

If a request of reconsideration, or petition under 37 CFR 1.182, is not filed within two months, the file will be returned to the Office of Initial Patent Examination for further processing with a filing date of November 7, 2002, using only the papers filed on that date.

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (703) 306-5683.



Charles Steven Brantley
Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy